U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 07Oct2002

CASE NO.: 2000-DBA-00006

In the Matter of
Disputes concerning the payment
of prevailing wage rates by

RIBAR CONTRACTING, INC.
Prime Contractor

With respect to laborers and mechanics
employed by Prime Contract
No. DACW-51-95-C-0073

Proposed debarment for labor standards violations by:

RIBAR CONTRACTING, INC.
Prime Contractor

NAVA LISTOKIN
President

BENNY RIVEN
Owner

MOSHE AVNI
Vice-President

With respect to laborers and mechanics
employed by the Prime Contract on Contract
NO. DACW-51-95-C-0073

ORDER ENFORCING SETTLEMENT

Procedural Background

This is a matter in which the Administrator of the Wage and Hour Division filed an Order of Reference alleging that Respondents disregarded their obligations under the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5) and committed willful and aggravated violations of the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 327 et seq. By order dated March 2, 2001, the undersigned granted the Administrator's Motion for Partial Summary Decision, finding that:

(1) respondents failed to pay the prevailing wage rates as required by the contracts;
(2) respondents failed to pay the fringe benefits as required by the contracts;
(3) respondents failed to pay time and a half for hours worked in excess of forty per week; and
(4) respondents falsified their certified payroll records as to the wage rates paid, the wages paid, the hours worked and the type of work performed.

This matter had been scheduled for hearing on January 15 -16, 2002 to resolve the two remaining issues: debarment and amount of back wages due each employee. Prior to the hearing, the parties engaged in discussions and agreed to settle the back wage issue and leave debarment as the sole issue for hearing. On December 21, 2001, counsel for the Administrator sent a document styled as a "Partial Consent Findings and Order" to Respondents counsel regarding the issue of back wages only. *See* ¶ 2, Declaration of Attorney Harold LeMar ("Administrator Decla."), attached hereto as Exhibit "A").

On or about January 7, 2002, counsel for Respondents called counsel for the Administrator and said that respondent would agree to settle the case on terms previously offered by counsel for the Administrator. These terms were:

(1) debarment for three out of the four named respondents (Ribar, Nava Listokin and Benny Riven)
(2) that respondents would agree to the release of a total of $150,407.55 to the Administrator for distribution to employees who worked on the contracts known as "Lake Montauk" and "Jones Inlet."

A separate discussion was held by the respective counsels regarding a New Jersey Contract which is not before this Court. *See* Administrator Decla. ¶ 3.

On January 7, 2002 counsel for the Administrator sent to the undersigned's office and to all parties by facsimile a letter stating that all issues were settled. *See* copy of said letter, attached hereto as Exhibit "B"; Declaration of Attorney Gerald J. McMahon ("Respondents Decla.") ¶ 5, attached hereto as Exhibit "C". On January 7,

2002 counsel for the Administrator sent "Consent Findings and Order" to counsel for Respondents regarding all issues. *See* Administrator Decla. ¶ 5. The revised documents were not signed by any member of the Department of Labor or any of its counsel.

On January 8, 2002, the undersigned issued an Order cancelling the hearing in this matter. *See* Order Cancelling Hearing, attached hereto as Exhibit "D". Said Order includes a reference to the parties having settled all issues and was served to both Respondents and Respondents' counsel. On or about January 9, 2002, counsel for the Administrator spoke to counsel for Respondents who requested that the settlement language be revised. Counsel for the Administrator agreed. On January 9, 2002 counsel for the Administrator sent revised "Consent Findings and Order" to counsel for Respondents with the agreed upon language. *See* copy of said letter, attached hereto as Exhibit "E".

On January 27, 2002, counsel for the Administrator spoke to counsel for Respondents who indicated that his clients had signed the papers and that he, Respondents' counsel, should receive them back during the week of February 4-8, 2002. *See* Administrator Decla. ¶ 8.

On March 8, 2002, counsel for the Respondents told counsel for the Administrator that part of the delay in getting the documents signed was the fact that Respondent Moshe Avni had relocated to Israel. Counsel for the Administrator stated that he would take faxed signature pages in the first instance. *See* Respondents Decla. ¶ 7.

On March 13, 2002, counsel for Respondents told counsel for the Administrator that he had received faxed copies of the signature pages and would be receiving the originals by FedEx. *See* Administrator Decla. ¶ 9; Respondents Decla. ¶ 8.

On March 14, 2002, counsel for the Respondents received the three original Stipulations of Settlement and Consent Findings, all of which had been signed by Respondents Listokin and Riven. *See* Respondents Decla. ¶ 10; *also see* copies of Settlement and Consent Findings, attached hereto as Exhibit "F." Also on March 14, 2002, counsel for the Respondents stated to counsel for the Administrator that his clients had just learned that they would be sued by a creditor for $800,000 and that there was no longer a settlement in this case. *See* Administrator Decla. ¶ 10.

ISSUE

Whether the parties had entered a binding, written agreement properly settling this matter.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges enumerate the requirements for properly settling matters before this court. See 29 C.F.R §18.9. More specifically and relevant to this issue, any "agreement disposing of all or part of the proceeding shall be written and signed by [the] parties. Such agreement shall conform to the requirements of paragraph (b) of this section." 29 C.F.R. §18.9(e)(9).[1]

On June 13, 2002, attorney for the Respondents sent the undersigned a Declaration which included the original "Stipulation of Settlement" and "Consent Findings and Order", both of which were signed by the remaining respondents, Nava Listokin and Benny Riven.[2] These settlement documents are in accordance with 29 C.F.R. §18.9(b). However, the issue remains as to whether the documents are in accordance with 29 C.F.R. §18.9(e)(9) and thereby enforceable against the Respondents because of the missing signatures. While the Respondents have signed, counsel for the Administrator has not, nor has the attorney for the Respondents.

There is no doubt that settlements are to be looked at as a positive force in judicial administration. *See Janneh v. GAF Corp.*, 887 F.2d 432, 435-436 (2d Cir. 1989). As the aforementioned Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges are silent on what exactly constitutes a proper signature so as to make a contract enforceable, I will look to

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[1] The requirements of 29 U.S.C. §18.9(b) state that any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;
(2) That the entire record on which any order may be based shall consist solely of the complaint, order of reference or notice of administrative determination ... and agreement;
(3) A waiver of any further procedural steps before the administrative law judge; and
(4) A waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

[2] Counsel for the Administrator has informed the undersigned that the third Respondent in this matter, Moshe Avni, has left the country and is not expected to return.

traditional contract law for guidance. "A settlement is a contract, and its construction and enforcement are governed by principles of contract law. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975)." *Macktal v. Brown & Root, Inc.*, 1989 WL 549876 *2 Case No. 86-ERA-23 (Decision of the Secretary of Labor, Nov. 14, 1989). Therefore, the settlement agreement must meet the formation, construction and enforcement principles of contract law. *See Eash v. Roadway Express, Inc.*, ARB Case No. 99-037 1999 WL 1001180 *5 (Oct. 29, 1999).

The next question becomes whether to use federal or New York state law in determining the construction and validity of this settlement contract. Respondents argue that in cases arising in New York, federal courts have held that New York Law applies. *See Sears Roebuck & Co. v. Sears Realty Co., Inc.*, 932 F.Supp. 392, 401 (S.D.N.Y. 1996). Further, they argue that there is no material difference between New York Law and federal common law. *See Ciaramella V. Reader's Digest Association, Inc.,* 131 F.3d 320, 322 (2d Cir. 1997). In light of these rulings, Respondents argue that CPLR §2104 is applicable.[3]

On the other hand, counsel for the Administrator argues that CPLR § 2104 does not apply to a matter based solely on federal common law. *See Kilcullen v. Metro North Commuter R. Co.*, 1998 WL 647171, * 7 n. 6 (S.D.N.Y. 1998). He further argues that since this matter is based solely on two federal statutes, the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5) and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 327 *et seq.*, New York state law is inapplicable. Nevertheless, counsel for the Administrator states that even if CPLR §2104 applies, there is a signed writing in Respondents possession thus satisfying the requirements of CPLR §2104.

I hold that using either federal law or CPLR §2104, the settlement agreement is enforceable against the Respondents. I will address each separately. Using federal law, as would be appropriate since this matter arose under two federal Acts, 29 C.F.R. §18.9(e)(9) applies. *See supra*. The issue then centers on whether this settlement was, in fact, signed by the parties in light of the missing attorneys signatures. The general rule is that attorneys of record are presumed to have the authority to settle litigation on behalf of their client. *See Mid-South Towing Co. v. Har-Win, Inc.*, 733 F.2d 386, 390 (5th Cir. 1984). The Second Circuit held that where an attorney acts within the ambit of his apparent authority in negotiating settlement agreements, the opposing party is entitled to rely on the attorney's authority as long as there is no reason to

[3] CPLR §2104 states: "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered."

believe that he was exceeding it. *See International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49, 55 (2nd Cir. 1979).

In this matter, it is undisputed that Respondents' counsel has the authority to settle this matter and that said authority came directly from the Respondents. At no time did Respondents' counsel dispute the Administrator's representation to this court dated January 7, 2002, that the matter was settled. Further, Respondents' counsel negotiated specific terms of the agreement before obtaining his client's signatures on the "Consent Finding and Order". On January 27, 2002, Respondents' counsel stated that the Consent Findings and Order had been executed by the Respondents. Indeed, the original "Consent Findings and Order" have been submitted, upon this court's Order, and both Respondents Listokin and Riven have signed the documents. Nevertheless, on March 14, 2002, Respondents' counsel stated that his clients changed their minds about settling because they just learned of a $800,000 lawsuit against them.

Under federal law, I hold that Section 18 is satisfied and this settlement is enforceable. Although the attorneys have not signed the agreement, Respondents have signed and the attorneys have clearly communicated to each other and this court that a settlement had been reached in this matter. To allow the Respondents to reject a settlement agreement, the terms of which their attorney was authorized to accept, were communicated to opposing counsel and were the basis for cancelling a scheduled hearing, would set a dangerous precedent. Allowing for an eleventh hour withdrawal from a properly executed settlement would seriously jeopardize the integrity and importance of the settlement process. In light of the fact that countless courts have made it clear that settlement agreements are to be looked upon favorably, I cannot allow for such action to be encouraged. I agree with the First Circuit when they state, "[w]here the agreement is made, as here, under the eyes of the court, it is a most solemn undertaking, requiring the lawyers, as officers of the court, to make every reasonable effort to carry it through to a successful conclusion." *Warner v. Rossignol*, 513 F.2d 678, 682 (1st Cir. 1985).

Using New York state law, while the issue is slightly different, the settlement remains enforceable against Respondents for two reasons. First, CPLR §2104 requires that the settlement agreement be binding upon a party when it is in writing and subscribed by the party or his attorney. Respondents have produced a signed writing. Although Respondents' counsel's actual signature is missing, the letter of the rule seems to make it unnecessary in this case. CPLR § 2104 does not require an attorney's signature where the parties have already signed. The Respondents have signed the Consent Finding and Order. Respondents' counsel communicated to the counsel for the Administrator that these papers had been signed. I find that these facts alone are enough to hold that this is a proper settlement under CPLR §2104.

Second, CPLR §2104 also states that the writing requirement is not required for settlements made in open court. New York courts view the 'open court' requirement of CPLR §2104 as a 'technical term that refers to the formalities attendant upon documenting the fact of the stipulation and its terms, and not to the particular location of the courtroom itself.' *See Popovic v. New York City Health and Hosps. Corp.*, 180 A.D.2d 493, 579 N.Y.S.2d 399, 400 (1st Dep't 1992); *see also Willgerodt v. Hohri*, 953 F.Supp. 557, 560 (S.D.N.Y. 1997). Thus, an oral settlement agreement is enforceable so long as it is in 'substantial compliance' with CPLR §2104. *See id.* The court in *Popovic* held that substantial compliance was found where the court entered notice of the settlement in its calendar and computer records. *See Popovic*, 579 N.Y.S.2d at 400. Here, the Court entered an Order on January 8, 2002 cancelling the hearing on the basis that the matter had been settled. A copy of this Order was sent to all parties and their counsel. Therefore, the parties and the court substantially complied with the statute under New York law.

Therefore, I hold that under both federal and New York state law, the resulting settlement agreement is enforceable against the Respondents.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, it is **ORDERED** that the Administrator's Motion to Enforce the Settlement Agreement is **GRANTED**.

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PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

APPEAL PARAGRAPH: Within 40 days of the administrative law judge's decision, an aggrieved party shall file a petition for review with the Administrative Review Board under 29 C.F.R. §6.34 with a copy to the Chief Administrative Law Judge. If a Petition for Review of the administrative law judge's decision is filed with the Administrative Review Board, the Chief Administrative Law Judge shall promptly transmit the record of the proceeding.

If an aggrieved party files a petition for review with the Board, the judges' decision is inoperative unless and until the Administrative Review Board declines to review the decision or issues an order affirming the decision.